

Opinion of the Court.

ing for payment false and fraudulent vouchers comporting therewith, upon the faith of which the money was paid. They are then jointly and severally bound to refund the sum so paid and received in violation of section 3961 of the Revised Statutes.

Assuming, as we must, on this hearing, the truth of the facts set forth in the complaint, we are of opinion that the demurrer should have been overruled.

As Piatt was not in the court below, it was error to have sustained the demurrer and dismissed the action as to him.

The judgment is reversed and the cause remanded for further proceedings in conformity to this opinion.

Reversed.

UNITED STATES *v.* SALISBURY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF CALIFORNIA.

No. 167. Submitted January 23, 1895. — Decided March 4, 1895.

United States v. Piatt and Salisbury, ante, p. 113, followed.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiffs in error.

Mr. Monroe Salisbury in person for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case differs very little from the one just determined. The complaint is in three counts. The first count alleges in substance that on March 15, 1878, one Thomas A. McDevitt contracted in writing with the United States, through the Postmaster General, to carry the mail on the route then known as No. 36,115, six times a week for the period of four years from July 1, 1878, for a consideration of \$6425, per

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annum, between Helena, Montana, by way of Hot Springs and Black Foot City, Toll Gate, Deer Lodge, Yamhill, Pioneer, New Chicago, and Bear's Mouth and Missoula and back. In pursuance of this contract McDevitt entered upon and continued the performance of the service until October 1, 1878, at which date he sublet his contract to Monroe Salisbury, the defendant, who performed the service during the remainder of the said contract term, to wit, until June 30, 1882. On July 1, 1879, the subcontract was duly recognized by the Postmaster General, and thenceforth such sums as were due and payable by virtue of the original contract, as afterwards amended and changed in the manner hereinafter set forth, were paid to said Salisbury.

For the purpose of expediting the service between Helena and Missoula and the intermediate places mentioned, the Postmaster General and McDevitt agreed, on December 24, 1878, to shorten the schedule of departures and arrivals on said route from January 1, 1879, and to increase the service. Accordingly, by order of the Postmaster General, the running time upon the route was reduced from 36 hours in summer and 59 in winter to 30 hours in summer and 45 hours in winter, in consideration of which an additional sum was allowed of \$9637.50 per annum, in supposed accordance with the provisions of section 3961 of the Revised Statutes of the United States. By said order the service was also increased one trip per week from January 1, 1879, for which an additional annual allowance of \$2671.08 was made — such allowance being computed *pro rata* upon the basis of the compensation in the original contract as increased by the additional allowance for increase of speed. These changes were agreed to by McDevitt.

After the execution of the subcontract between McDevitt and Salisbury, whereby all moneys thereafter due the former under the original contract were to be paid to the latter, McDevitt, in his own name, but in the interest and at the instigation of Salisbury, did, by means of certain false and fraudulent representations set forth in a sworn statement dated December 18, 1878, represent to the Postmaster General that, in order to perform the service upon the then existing schedule

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it required 6 men and 24 horses, and to perform the proposed expedited service would require 15 men and 60 horses, which representations were wholly false and fraudulent in that neither McDevitt nor Salisbury ever required or used in carrying the mail upon the expedited schedule any greater number of men or horses than McDevitt alleged in his sworn statement were required for or actually used in performing the service upon the original schedule. And those false representations were designed to mislead and did mislead the Postmaster General.

By means of such fraudulent statements by McDevitt, and by means of fraudulent vouchers presented to the Post Office Department, Salisbury was paid by and received from the United States a larger sum of money than he was entitled to for the performance of such mail service under the amended contract. The sum so received by him in excess of what he was legally entitled to receive between July 1, 1879, (the date on which the subcontract was first recognized by the Post Office Department,) and July 1, 1882, was \$30,690.16. The original contract between the plaintiff and McDevitt and the subcontract between McDevitt and Salisbury were exhibited with the complaint and made part thereof.

Judgment was demanded for this sum with interest from July 31, 1882, and costs.

The second count is the common law count for money had and received.

The third count sets forth the same facts as in the first count, and alleges that by reason thereof the plaintiff's officers were induced to pay the moneys aforesaid from July 1, 1879, to July 31, 1882, amounting in the aggregate to \$30,690.16, which sum was paid by the plaintiff's officers as above set forth, in mistake of fact, and was received by said defendant contrary to the provisions of section 3961 of the Revised Statutes of the United States.

In this case the subcontractor only was sued, while in the former case both the principal contractor and the subcontractor were sued.

The present case is controlled by the decision just rendered in *United States v. Piatt*, ante, 113.

Syllabus.

The judgment is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings in conformity with this opinion.

The decision in this and the preceding case control cases 168, 169, 170, 171, the title of each of those cases being *United States v. Salisbury*. The judgment in each case is reversed and the cause remanded with directions to overrule the demurrer and put the defendant to his answer.

Reversed.

THE CALEDONIA.¹

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MASSACHUSETTS.

No. 107. Argued December 12, 13, 1894. — Decided March 11, 1895.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy; and this being so, his undertaking is not discharged because the want of fitness is the result of latent defects. A bill of lading whereby a steamship owner undertakes to deliver live cattle at a foreign port, loss or damage from delays, steam boilers and machinery or defects therein excepted, does not exempt him from liability under such warranty for injury happening to the cattle through an unexpected prolongation of the voyage, in consequence of a breaking of the shaft caused by a latent defect in it, which existed before and at the commencement of the voyage. Exceptions in a bill of lading are to be construed most strongly against the shipowner; and when they form, in the contract, part of long enumerations of excepted causes of damage, all the rest of which relate to matters subsequent to the beginning of the voyage, they must be treated as equally limited in their scope. As between the shipper and the shipowner, the bill of lading only can be considered as the contract.

¹ The docket title of this case is "James Henderson *et al.*, Claimants of the Steamship Caledonia, *v.* Goldsmith."